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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 892

GRANT FOSTER AND FOSTER CONSTRUCTION, C.A.,
Petitioners

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on March 16 and revised on March 1 1959.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix B and C, infra pp. 5a and 14a)[1] has not yet been reported. The opinion of the United States District Court for the Southern District of New York is reported at 159 F. Supp. 444 (January 22, 1958).

JURISDICTION

The original judgment of the Court of Appeals was entered on March 16, 1959. Two days later that Court entered a revised opinion in which it denied the partial relief from the stay order of the District Court previously granted in the original opinion. A timely petition for rehearing *in banc* was denied by the panel rendering the judgment in the case. (The petition for rehearing *in banc* was not considered *in banc*.) The mandate of the Court and the denial of the rehearing *in banc* issued on April 8, 1959. Petitioners received notice thereof on April 10, 1959 and promptly filed a motion to recall the mandate and to stay its issuance. The respondent filed no response and on April 16, 1959, the Court denied the motions to recall and for a stay. On April 24, 1959, Mr. Justice Harlan granted petitioners a stay of the order of the United States District Court for the Southern District of New York provided the petitioners filed a petition for certiorari on or before May 5, 1959.

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[1] The record lodged herewith includes the Joint Appendix in the Court of Appeals which appendix was attached to Brief for Intervenor-Appellants, and the page numbers refer to such Appendix. When the Appendix to this Petition and Brief are referred to, the page number is preceded by "infra".

QUESTIONS PRESENTED

The Questions Presented for which certiorari is sought are:

(1) Whether an Internal Revenue Agent, when proceeding in a United States District Court for enforcement of a subpoena issued by him against a third party for records relating to a taxpayer, pursuant to Sections 7602 and 7604 of the Internal Revenue Code of 1954, need not make an allegation of a suspicion of fraud by the taxpayer for the taxable years under inquiry, otherwise barred by the statute of limitations, or whether the Revenue Agent must (a) allege and (b) show to the satisfaction of the Court, pursuant to said Sections 7602 and 7604, that there is "probable cause" or "a reasonable basis" for him to believe that the taxpayer filed fraudulent returns for those years.

(2) Whether a petitioner who is granted full intervention in the District Court is entitled on appeal to a stay or supersedeas as of right under reasonable conditions, or whether the District Court could impose as a condition of a stay, the execution of waivers of the statute of limitations for all taxable years, including those not under investigation.

The related questions presented which petitioners will raise if certiorari is granted are:

(3) Whether, even though petitioners were granted full rights of intervention in the District Court, they lack standing on appeal to raise Fourth Amendment issues (which were raised in the District Court) despite the holding of the United States Supreme Court in *International Union* v. *Eagle Picher Mining Co.*, 325 U.S. 335, 65 S. Ct. 1166 (1945).

(4) Whether the Court of Appeals, having no written rule, either in its Rules of Civil Procedure or set forth in a reported decision, regarding the disposition of motions for rehearing *in banc* is required under this Court's decision in *Western Pacific Railroad Corp. v. Western Pacific Co.*, 345 U.S. 247, 73 S. Ct. 656 (1953) to convene the Court *in banc*, to dispose of the motion.

STATUTE INVOLVED

The pertinent statutory provisions of the Internal Revenue Code of 1939 and 1954 are printed in Appendix A, infra, pp. 1a-4a.

STATEMENT OF THE CASE

On July 31, 1957, an agent of the Internal Revenue Service, Nathan Zeldin, of Miami, Florida, herein referred to as the Revenue Agent, served a summons on the New York Agency of the Bank of London and South America, Ltd., herein referred to as the Bank, (issued pursuant to Sec. 7602 of the Internal Revenue Code of 1954, 26 U.S.C. 7602) (18).

The summons was captioned "In the Matter of the Tax Liability of Grant Foster" and called for the production before the Revenue Agent on August 12, 1957, among other things, of all the records in the possession of the Bank relating to Grant Foster and Foster Construction, C.A., a Venezuelan corporation, for the years 1949 through 1957. The Bank refused to comply with this summons. Enforcement of this summons was never sought by the Agent. Thereafter, a second summons, more general in terms and broader in scope, was served on the Bank on August 29, 1957 (18, 7-8).

The Bank, having refused to comply with the second summons, on September 18, 1957, the United States

Attorney for the Southern District of New York applied to the District Court pursuant to 26 U.S.C. Sec. 7602 and obtained an *ex parte* order. The order directed the Bank to produce at 10:00 a.m. on September 20, 1957, the following books and records of Grant Foster and Foster Construction, C.A.:

> "books, papers, records and memoranda, of whatsoever nature or kind relating to the accounts of Foster Construction, C.A. and Grant Foster including the signature cards, ledger sheets and cancelled checks for the period 1949 to 1956 inclusive" (4-9).

This order was obtained on the basis of an affidavit of Agent Zeldin which stated, in part, that he was investigating:

> "* * * the tax liability for the years 1949 to 1956 of Grant Foster who is allegedly a non-resident citizen of the United States last known to be residing at Apartado No. 6, Punto Pije Caracas, Venezuela, and giving his occupation as a corporate officer.
>
> "2. Prior to April 30, 1949 Grant Foster's income was derived from the Foster Construction Co., his individually owned business. On April 30, 1949 he alleges he became employed by the Foster Construction Compania Anonima, a Venezuelan corporation, which remains a domiciliary of Venezuela. In 1955 or 1956 he alleges he became employed by the Foster Construction Compania Anonima of Costa Rica. From mid 1949 to date he has claimed complete exclusion of monies earned and purportedly paid to him as salary by the Foster Construction C.A. under Sec. 911 Internal Revenue Code 1954."
>
> "3. The Foster Construction C.A. maintains an active commercial banking account at the New York Agency of the Bank of London and South

America, Limited, 34 Wall Street, New York 5, New York, which bank retains signature cards, ledger sheets and cancelled checks of the Foster Construction C.A. and this account has been active from 1949 to 1956 inclusive."

* * *

"5. The books and records demanded in the summons are required to authenticate the exclusion of income claimed by the taxpayer to have been received as salary from the Foster Construction C.A. since its inception, and afford the only opportunity for the government to determine whether the income received by the taxpayer from the Foster Construction C.A. actually represents salary or the distribution of profits in the form of salary." (3-6)

On September 19, 1957, an *ex parte* order was obtained *by the Bank* to show cause on September 24, 1957, why the order of September 18, 1957 for the production of the said records should not be vacated. This order was obtained on the basis of an affidavit of Robert J. Bird (one of Grant Foster's counsel) which stated, among other things, that he was advised by Grant Foster that he [Mr. Foster] had only a 3% stock interest in Foster Construction, C.A., a Venezuelan corporation. Mr. Bird's affidavit raised the issues that (a) no reason was set forth (a suspicion of fraud was not even alleged) to justify an examination of the barred years and, (b) the documents were not specified and their relevancy and materiality was not shown (11-13).

A. Hearing Before the District Court

At oral argument before the District Court on September 24, 1957, on the order to show cause why the order for production should not be vacated, counsel for the Bank appeared and stated that argument on it-

behalf would be made by counsel for Grant Foster and Foster Construction, C.A. During the argument, a motion to intervene was made by Grant Foster and Foster Construction, C.A. (and consented to by the United States Attorney) (24, 28).

Among the questions argued before the District Court and in the Brief filed by petitioners were that (1) any examination of returns for years beyond the statute of limitations was barred by Section 7605(b) of the Code as unnecessary and the Revenue Agent failed to show "probable cause" or "a reasonable basis" for a suspicion of fraud; (2) the scope of the subpoena was too broad under the Fourth Amendment; and (3) the records of Foster Construction, C.A. in the custody of the Bank were not shown to be relevant or material to the tax liability of Grant Foster (11-13).

Even though the affidavit of Mr. Bird was in direct conflict with material portions of Agent Zeldin's affidavit and even though Agent Zeldin was present in the courtroom, he was not offered for examination or cross-examination to resolve the conflicts. A supplemental affidavit of Agent Zeldin was filed at the time of the hearing. Such supplemental affidavit is not material here as the Court of Appeals noted that it specifically disregarded it in arriving at its decision (16-17, infra p. 7a).

B. Decision of the District Court

On January 23, 1958, the District Court rendered its decision denying the motion to vacate the order of September 18, 1957, for the production of said records. Grant Foster and Foster Construction, C.A. appealed to the Court of Appeals for the Second Circuit. In order to obtain a stay of the District Court's order, Grant Foster and his wife were required to execute

waivers of statute of limitations regarding their personal income tax returns not only for the years 1949, 1950, 1952 and 1954, the years under investigation, but also for the years 1947 and 1948 which were not under investigation (23-28, 34, 45).

C. Appeal Before the Second Circuit

On appeal to the Court of Appeals, the petitioners raised the issues that (1) the Revenue Service was not entitled to documents subpoenaed as "probable cause" was not established, (2) the scope of the subpoena was so broad as to violate the Fourth Amendment, (3) the documents called for in the subpoena were not established to be relevant or material to the inquiry and (4) as the petitioners were entitled to an appeal as of right, they were entitled to a stay without onerous conditions or waiving statutory rights. Oral argument was had before the Court on December 8, 1958.

D. Decision of the Panel of the Second Circuit

On March 16, 1959, the Court of Appeals issued its decision in which it held that the Revenue Agent was not required to show "probable cause" or "a reasonable basis for a suspicion of fraud by the taxpayer in order to examine documents relating to years barred by the statute of limitations and in the possession of a third party. In fact, the Court specifically disregarded a supplemental affidavit filed by the Revenue Agent and held that it was not necessary that he even allege fraud or a suspicion thereof. The Court held that the Revenue Agent could obtain records of transactions 3 years ago,* 5 years ago,** and in fact, for any

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* Sec. 275(a) of 1939 Code, infra, p. 1a.

** Sec. 6501(c) of 1954 Code, infra, p. 2a.

longer specified period which had elapsed since the filing of the tax return, or returns by the naked allegation that it was for the purpose "of ascertaining the correctness of any return" or to "determine the liability of any person for any internal revenue tax."

The Court affirmed the order of the District Court enforcing the summons. However it held that the stay order of the District Court lacked specificity in requiring the execution of waivers by Grant Foster and his wife of the statute of limitations in regard to the tax returns "covering all open tax years." The Court of Appeals then modified the District Court's order by restricting waivers to the years under investigation, 1949-1956 inclusive (App. B, infra pp. 5a, 12a-13a).

E. Revised Decision of the Panel

Nevertheless, two days later on March 18th, the Court of Appeals revised its decision and held that the lower court had not passed the bounds of discretion and that it was now proper for the lower court to have required waivers as to the years 1947 and 1948 since 5 years had not elapsed since the tax returns of 1947 and 1948 had been filed (App. C, infra p. 14a). Despite this revised statement by the Court, there is no evidence whatsoever in the record below to support the statement or contention that five years had not elapsed since the 1947 and 1948 tax returns of Grant Foster were filed (16-17, 36).

Thereafter, petitioners timely filed the motion for reconsideration *in banc* as set forth herein.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Second Circuit in the instant case, wherein it holds that under Sections 7602 and 7604 of the Revenue Code it is not necessary to make a showing of "probable cause" or "a reasonable basis" that fraud has been committed by the taxpayer in order to entitle a Revenue Agent to an order of the District Court to enforce a subpœna for records in the possession of third parties is in direct conflict with the controlling decisions in five, and probably six, Circuit Courts of Appeals involving substantially identical facts.

It conflicts with a recent decision in the First Circuit, *O'Connor* v. *O'Connell*, 253 F. 2d 365 (1st Cir. 1958), a carefully considered opinion in which the principal authorities are reviewed; and in the Third Circuit with *Zimmerman* v. *Wilson*, 105 F. 2d 583, 586 (3d Cir. 1939); in the Fifth Circuit with *Falsone* v. *United States*, 205 F. 2d 734 (5th Cir. 1953); in the Sixth Circuit with *Peoples Deposit Bank & Trust Co.* v. *United States*, 212 F. 2d 86 (6th Cir. 1953), aff'g. 112 F. Supp. 720 (E.D. Ky, 1953); in the Eighth Circuit with *United States* v. *Third Northwestern National Bank*, 102 F. Supp. 879 (D. Minn. 1952) app. dis. 196 F. 2d 501 (8th Cir. 1952) and *Schwimmer* v. *United States*, 232 F. 2d 855 (8th Cir. 1956), cert. den. 352 U.S. 833, 77 S. Ct. 48 (1956); and in the Ninth Circuit with *Martin* v. *Chandis Securities Company*, 128 F. 2d 731 (9th Cir. 1942), a leading case hitherto unanimously followed in all Circuits where the records sought, as here, were in the possession of a third party, *Hubper* v. *Tucker*, 245 F. 2d 35 (9th Cir. 1957) and *Local 174* v. *United States*, 240 F. 2d 387 (9th Cir. 1956).

Many Circuits and District Courts have made a distinction between situations where the records are sought from the taxpayer and where records involving the taxpayer are sought from third parties. However, the authorities have held universally that where third parties are involved, the Revenue Agent is required to make a showing of "probable cause" for suspecting fraud to inspect records covering years barred by the statute of limitations where the records for barred years are not necessary for a net worth or depreciation study involving open years. *O'Connor v. O'Connell, supra; Peoples Deposit Bank & Trust Co. v. United States, supra; United States v. Third Northwestern National Bank, supra; Martin v. Chandis Securities Company, supra; Falsone v. United States, supra; In re Brooklyn Pawnbrokers, Inc.*, 39 F. Supp. 304 (E.D.N.Y. 1941); *In re Andrews' Tax Liability*, 18 F. Supp. 804 (D. Md. 1937).

Even where the records sought are in the hands of the taxpayer, the First Circuit in *O'Connor v. O'Connell*, 253 F. 2d 365 (1958), has recently re-examined all the authorities and specifically rejected the rule in the Second Circuit holding that Sections 7602 and 7604 of the Code do not require a showing of "probable cause" or "a reasonable basis". In so doing it stated at pages 369-370:

> "Although the Court of Appeals for the Second Circuit in *Application of United States* (In re Carroll), 2 Cir. 1957, 246 F. 2d 762 certiorari denied, 1957, 355 U.S. 857, 78 S. Ct. 85, 2 L. Ed. 2d 64, found no need to answer this precise question it nevertheless gave rather detailed consideration to the conflicting authorities bearing upon it. *No useful purpose would be served by repeating Judge Medina's discussion and exhaustive citations here,*

*for many of the cases he cites are somewhat vague and in only a few of them is the question given more than cursory consideration. * * * although perhaps the numerical weight of authority supports the position taken by the Government and by the court below, we think the taxpayer's position is supported by the better reason."* (In each instance herein emphasis has been supplied.)

* * *

"We may well assume that considerations such as these had weight with Congress when it legislated in Sec. 7605(b) to curb excessive administrative zeal by protecting taxpayers from unnecessary examination and investigation. But if these considerations are to be adequately served we cannot adopt the Government's contention that to obtain an order for enforcement as to a 'closed' year all that the Secretary or his delegate needs to show is the honesty of his subjective belief that 'fraud existed in such a year. The reason for this is that in the Government's view the necessity for an examination into a closed year would for all practical purposes be left to administrative determination and Sec. 7605(b) would be relegated to hardly more than a pious exhortation directed to the tax authorities. * * * according to the Government's contention, the court's function under Sec. 7604 would be reduced to little more than that of summarily affixing its stamp of approval to administrative action, for we can hardly assume that agents of the Internal Revenue Service would undertake to examine a taxpayer as to a closed year when they did not honestly believe that the taxpayer had been guilty of fraud in such a year. We cannot assume that the agents of the Internal Revenue Service would undertake an examination into a closed year only to harass and annoy a taxpayer.

"To make the Congressional purpose expressed in Sec. 7605(b) to protect taxpayers from unnecessary examinations truly effective we think the Secretary or his delegate, when a court order is needed to enforce compliance with a summons to testify as to a 'closed' year, should be required to establish to the court's satisfaction that there is probable cause for an investigation into such a year.

* * *

"This does not mean that proof of fraud is required. It means only that before the tax authorities are entitled to a district court order enforcing a summons directing a taxpayer to testify as to a closed year they must establish to the district court's satisfaction that a reasonable basis exists for a suspicion of fraud, or put another way, that there is probable cause to believe that the taxpayer was guilty of fraud in a statute barred year. *We, therefore, disagree in principle with United States* v. *United Distillers Products Corp., 2 Cir. 1946, 156 F. 2d 872, 874, and Globe Construction Co.* v. *Humphrey, 5 Cir. 1956, 229 F. 2d 148, and agree with the rule as it was assumed to be in Martin* v. *Chandis Securities Co., 9 Cir. 1942, 128 F. 2d 731, 735,* wherein it is said:

> "'It is the appellant's contention that the only showing required (and we assume also the only allegation required) is a "showing of probable cause, sometimes called reasonable ground for suspicion of fraud." * * * *'"

The Court below attempted to distinguish the *O'Connor* opinion on the ground that the summons had been directed to the taxpayer himself and that the Court there relied upon Section 7605(b) of the Revenue Code which provides for restrictions on the examination of the taxpayer. It disregarded the

fact that Section 7605(b) provides that no taxpayer shall be subject to unnecessary "examination or investigations." Because the subpoena was directed to a third party does not change the fact that it was an "investigation" of Grant Foster's return. It has been held repeatedly that Section 7605(b) is a restriction on the power of the Revenue Service and not a mere personal right of the taxpayer. *Falsone* v. *United States*, 205 F.2d 734 (5th Cir. 1953); *First National Bank of Mobile* v. *United States*, 160 F. 2d 532 (5th Cir. 1947); *Martin* v. *Chandis Securities Company*, 128 F. 2d 731 (9th Cir. 1942).

Likewise, in reaching a decision which is in conflict with the decisions of five other circuits, the Second Circuit has disregarded the language of two leading cases decided by different panels of that Court. In *Matter of Levine*, 149 F. Supp. 642 (S.D.N.Y. 1956), where a taxpayer had petitioned to vacate a Revenue Agent's summons, Judge Irving R. Kaufman stated the general rule (which now conflicts with the present holding of the Second Circuit) as follows, at page 643:

> "The question of probable cause for such investigations comes into play when a third party is requested to produce records relating to the taxpayer under investigation. See e.g. Falsone v. United States, 5 Cir. 205 F. 2d 734, certiorari denied, 1953, 346 U.S. 864, 74 S. Ct. 103, 98 L. Ed. 375; United States ex rel Sathre v. Third Northwestern National Bank, D.C. D. Minn., 102 F. Supp. 879, appeal dismissed, 8 Cir. 1952, 196 F. 2d 501. * * * Petitioner does not * * * allege that his account books have been previously examined for the years in question. *Nor does he invoke any question of the Statute of Limitations.* Thus he has presented no reason for denying the Treasury Department its statutory right to examine him to see if taxes have been properly paid."

The Second Circuit in a *per curiam* decision affirmed the order "on the opinion of District Judge Kaufman", 243 F. 2d 175 (2d Cir. 1956).

A year later, the Second Circuit restated the same principle in *Application of United States (Carroll)*, 246 F. 2d 762 (2d Cir. 1957), cert. den. 355 U.S. 857, 78 S. Ct. 85 (1957). Judge Medina writing for the Court quoted the *Levine* opinion with approval at page 764 (This has now been repudiated by the panel of the Second Circuit in the case at bar).

> "In Matter of Levine, 2 Cir. 243 F. 2d 175, affirming an opinion below, D.C., 149 F. Supp. 642, 643, we adopted Judge Kaufmann's statement that the Code 'requires no showing by petition or affidavit that there is cause for believing taxes have not been properly paid where the examination is of the taxpayer himself as is the case here. The very purpose of the examination is to discover whether tax liability exists and the provision was put into the law to enable the Treasury Department to perform its statutory duty of ensuring that taxes are being properly paid' * * *. *The question of probable cause for such investigations comes into play when a third party is requested to produce records relating to the taxpayer under investigation.*' The opinion goes on to say that the petitioner has pointed out no procedural defect. 'Nor does he invoke any question of the Statute of Limitations. Thus he has presented no reason for denying the Treasury Department its statutory right to examine him to see if taxes have been properly paid.'
> * * *
>
> "*We are not now called upon to resolve the apparent conflict* between the cases dealing with what the tax authorities must show to warrant examination of the taxpayer and others relative to matters which may be barred by the statute of limitations.
> * * *"

The material part of the holding of the Second Circuit in the present case is as follows:

> "We hold to the position which we took in the United Distillers case and hold that an examination whether of a taxpayer or a third party, is not unnecessary or unreasonable (within the meaning of the Fourth Amendment) merely because three years, or five years, or any longer specified period of time has elapsed since the tax return under investigation was filed. The examination provided by Sec. 7602 is for the expressly stated purpose not only 'of ascertaining the correctness of any return' but also for 'determining the liability of any person for any internal revenue tax.' The Commissioner is therefore entitled to the examination if it may shed light on whether a liability still exists or whether it has been time-barred."

Merely to state this quotation is to demonstrate that this new rule announced by the Second Circuit is contrary to the principal authorities in all other Circuits.

The Court's function under Section 7604 would thus be reduced to merely "rubber stamping" approval of the Revenue Agent's action of the Court is not permitted (and required) to examine into the "probable cause" or "a reasonable basis" for the Agent's suspicion. Resort to the courts by the Revenue Agent under Section 7604 would then become an empty formality despite the specific legislation to the contrary by the Congress.

As Mr. Justice Frankfurter pointed out so cogently in his dissent in *Penfield Co. of California* v. *Securities and Exchange Commission*, 330 U.S. 385, 603, 67 S. Ct. 918, 928 (1947), the Congress has never attempted to confer upon an administrative agency itself the power to compel obedience to a subpœna. Instead of au-

thorizing the agencies to enforce their subpœnas, Congress has required them to resort to the courts for enforcement. He went on to state that:

> "In discharge of that duty, *courts act as courts and not as administrative adjuncts.* The power of Congress to impose on courts the duty of enforcing obedience to an administrative subpœna was sustained precisely because *courts were not to be automata carrying out the wishes of the administrative.* They were discharging judicial power with all the implications of the judicial function in our constitutional scheme. * * * Accordingly, an order directing obedience to a subpœna by the Securities and Exchange Commission, like a subpœna of any other federal agency, does not issue as a matter of course."[2]

However, it should be noted that under the new rule announced by the Second Circuit in this case,

[2] In his dissent in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 219, 66 S. Ct. 494, 510 (1946), Mr. Justice Murphy expressed other fears concerning the unrestricted use of administrative subpoenas:

> "Perhaps we are too far removed from the experiences of the past to appreciate fully the consequences that may result from an irresponsible though well-meaning use of the subpoena power. To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power. It is no answer that the individual may refuse to produce the material demanded. Many persons have yielded solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening.
>
> "Only by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty. Statutory enforcement would not thereby be made impossible. Indeed, it would be made easier. * * *"

upon the filing of an application by the Revenue Agent stating that he needs records of three years ago, five years ago, or for any longer specified period (even though assessment is barred by statute in the absence of fraud) for the purpose "of ascertaining the correctness of any return" or "to determine the liability of any person for any internal revenue tax", the subpœna is automatically enforced; the Court does not act as a court; the court does not exercise its judicial function as provided by the Congress; it instead acts as an administrative adjunct. The fear expressed by Mr. Justice Frankfurter and other Justices that, unless encroachment on judicial power were carefully scrutinized the federal courts eventually would abdicate their historic function under the Constitution in enforcement cases has now come to pass as a result of the present decision. It is here despite the express provisions of Sections 7602 and 7604 to the contrary.

The interpretation of Section 7605(b) urged by petitioners and supported by the decisions of at least five of the circuits is in accord with traditional limitations upon the inquisitorial power of government. That Congress has become greatly concerned with the exercise of arbitrary power by administrative agencies is shown by the enactment of the Administrative Procedure Act, 5 U.S.C. App. 1005(c) and the Taft-Hartley Act; 29 U.S.C. 160(b).

II.

As the First Circuit pointed out in *O'Connor v. O'Connell*, 253 F. 2d 865 (1958), it chose between conflicting authorities the rule of those Circuits which it believed to be supported by the better reason. The case at bar adds even more confusion and involves a case of importance in the administration of the tax

laws and concerns the rights and responsibilities of the taxpayers and third parties who keep their accounts and with whom they do business.

The United States Supreme Court has never passed on or interpreted Section 7602, 7604, or related sections of the Internal Revenue Code. Previous decisions of this Court involving the subpoena power of grand juries and administrative agencies such as *C.A.B.* v. *Hermann*, 353 U.S. 322, 77 S. Ct. 804 (1957); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 70 S. Ct. 357 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 66 S. Ct. 494 (1946); *Endicott-Johnson Corp* v. *Perkins*, 317 U.S. 501, 63 S. Ct. 339 (1943); *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298, 44 S. Ct. 336 (1924); *Wilson* v. *United States*, 221 U.S. 361, 31 S. Ct. 538 (1920); *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541, 28 S. Ct. 178 (1908) do not dispose of the important questions raised by the case at bar.

These authorities involve subpoenas issued in administrative proceedings involving regulated industries. Under the statutes establishing these agencies, the regulated industry is required to keep records. The bank is not required by the Revenue Code to keep the records of Grant Foster or Foster Construction, C.A. for the benefit of the Revenue Service. There is no statute of limitations in these statutes barring administrative action or precluding assessment as in the Revenue Code.[3] Wherever there has been, as in the

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[3] For example, the Federal Trade Commission Act, as amended (15 U.S.C. 49) provides, in part:

§ 49. Documentary evidence; depositions; witnesses

For the purposes of sections 41-46 and 47-58 of this title the commission, or its duly authorized agent or agents, shall at all rea-

case of the Taft-Hartly Act, 29 U.S.C. 160(b), Section 10(b) of which provides that the National Labor Relations Board cannot issue a complaint unless a charge has been filed within six months of the event, that Board has been precluded from subpoenaing records, prior to that six-month period concerning violations of that Act which occurred within that

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sonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

The Fair Labor Standards Act (41 U.S.C. 39) provides, in part:

Sec. 39. *Same; hearings by Secretary of Labor;* witness fees; failure to obey order; *punishment*

"Upon his own motion • • • the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. • • • *In case of contumacy,* failure or refusal of any person to obey such an order, any District Court of the United States • • • within the

period.[4] Likewise, these statutes do not contain provisions similar to Section 7605(b) of the Revenue Code prohibiting the Revenue Service from making unnecessary examinations and investigations of the taxpayer.

These cases involve a question of coverage.[5]

In each instance, Congress vested the agency with regulatory power in a broad field. The agency was specifically given primary jurisdiction to reach a tentative conclusion and subpoena records to establish the fact of coverage. Its power of investigation in

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jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, • • • *upon the application by the Secretary of Labor or representative designated by him, to produce evidence if, as and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States*, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; • • • "

[4] *N.L.R.B.* v. *General Shoe Corp.*, 192 F. 2d 504, 507 (6th Cir. 1951); *N.L.R.B.* v. *Clausen*, 188 F. 2d 439, 443 (3d Cir. 1951). See also *N.L.R.B.* v. *Anchor Rome Mills*, 197 F. 2d 447, 449 (5th Cir. 1952).

[5] For example, in the *Oklahoma Press Publishing Co.* case, supra, the issue was whether the First Amendment precluded coverage of newspapers under the Fair Labor Standards Act. No issue of the scope or validity of the subpoena was involved.

In the *Endicott-Johnson* case, *supra*, the principal issue was whether local plants (not in interstate commerce) of a large manufacturing company were covered by the Act.

In the *Morton Salt* case, *supra*, an investigation was undertaken by the Federal Trade Commission to determine whether there had been compliance with that Agency's cease and desist order, the enforcement of which had been decreed by the Federal Court.

such field, like those of a grand jury, are almost unlimited as long as constitutional rights are not violated. The issue, to first be determined by the agency rather than the courts, was whether some individual or entity was within or without the field.

In the case at bar there is no issue of coverage. While these cases might be germane to the narrow issue of coverage in a case such as *Matter of Carroll*, 246 F. 2d 762 (2d Cir. 1957), cert. den. 355 U.S. 857, 78 S. Ct. 85 (1957), they are inapposite here. On the other hand, the Revenue Service is barred from the collection of taxes beyond three years under the 1939 Code unless there is an understatement of income in the amount of 25% (5 years) or fraud (no limit). No statute of limitations was present in the *Oklahoma Press* case, or in any of the others cited by the Court of Appeals. An analogy to the subpoena power of these administrative agencies is the power of the Director concerning *open tax years*. Hence these authorities do not apply where closed years are involved.

Congress intentionally circumscribed the power of the Director in Section 275(a) and Sections 7602-7606 of the Internal Revenue Code. It clearly defined what the Director must establish to obtain enforcement. Analogies to grand jury subpoenas are not justified as it is an instrument "or appendage" of the court having general jurisdiction over federal crimes. The grand jury's power is untrammeled as long as constitutional guarantees are accorded witnesses and defendants. It can even investigate the investigators for cause or for no cause. In contrast, an executive agency is bound by the limitations of its enabling statute.

The decision of the panel of the Second Circuit in the case at bar is a radical departure from the reported decisions and can not be reconciled with the decisions of other panels of the Court in *Matter of Carroll*, 246 F. 2d 762 (2d Cir. 1957), cert. den. 355 U.S. 857, 78 S. Ct. 85 (1957); *Norda Essential Oil and Chemical Co.* v. *United States*, 230 F. 2d 764 (2d cir. 1956); *Matter of Levine*, 149 F. Supp. 643, aff'd per curiam 243 F. 2d 175 (2d cir. 1956); *In re Albert Lindley Lee Hospital*, 209 F. 2d 122 (2d cir. 1953) cert. sub nom., *Cincotta* v. *United States*, 347 U.S. 960, 74 S. Ct. 709 (1954); and *United States* v. *United Distillers Products Corp.*, 156 F. 2d 175 (2d cir. 1946). Because of this, on March 31, 1959, the petitioners, in an attempt to call the attention of the panel of Second Circuit, as well as that of the full Court, to the incompatibility of its decision with those of other panels of that Court and to the newly created conflict with the decisions of five other circuits, timely filed a 15-page printed Application for a rehearing *en banc*. Ten days later, on April 8, 1959, and in the absence of a response from the United States Attorney, the panel issued an order stating only that "the motion for rehearing is denied".

This issue is bound to be one of continuing importance under the Revenue Codes of 1939 and 1954 and successive Revenue Acts, and widespread litigation in the District and Circuit Courts will continue until the issue is ultimately settled by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 5, 1959

APPENDIX

APPENDIX A TO PETITION

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Internal Revenue Codes

1939 Code, Section 275(a)

"(a) General Rule.—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceedings in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

1954 Code, Section 911(a)

"(a) General Rule.—The following items shall not be included in gross income and shall be exempt from taxation under this subtitle:

"(1) Bona Fide Resident of Foreign Country—In the case of an individual citizen of the United States, who establishes * * * that he has been a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year, amounts received from sources without the United States * * * if such amounts constitute earned income * * *."

1954 Code, Section 6501(c)

(Previously 1939 Code, Sec. 276(a), 53 STAT. 87)

"(a) False Return or No Return.—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

1954 Code Sections 7602 to 7605, inclusive

§ 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officers or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

§ 7603. Service of summons

A summons issued under section 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

§ 7604. Enforcement of summons

(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found, shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the

judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

§ 7605. Time and place of examination

(a) Time and place.—The time and place of examination pursuant to the provisions of section 7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602 the date fixed for the appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

(b) Restrictions on examination of taxpayer.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

APPENDIX B

Decision of United States Court of Appeals For the Second Circuit

No. 28—October Term, 1958.

(Argued December 8, 1958 Decided March 16, 1959.)

Docket No. 25073

GRANT FOSTER and FOSTER CONSTRUCTION C. A.,
Intervenors-Appellants;

v.

UNITED STATES OF AMERICA, *Appellee*.

Before: CLARK, *Chief Judge*, and HINCKS and LUMBARD, *Circuit Judges*.

Appeal from an order of the United States District Court for the Southern District of New York entered by Bicks, *J.*, refusing to vacate an enforcement order under 26 U. S. C. A. § 7604 (I. R. C. 1954), 159 F. Supp. 444, and from an order of said court, Dawson, *J.*, allowing supersedeas only on condition that the taxpayer waive the statute of limitations as a defense to possible tax claims. *Affirmed.*

JOHN K. PICKENS, Washington, D. C. (M. Joseph Stoutenburgh, Robert J. Bird, Bird and Thompson, and Dawson, Griffin and Pickens, Washington, D. C., on the brief), *for intervenors-appellants.*

RENEE J. GINSBERG, Asst. United States Attorney for the Southern District of New York, New York, N. Y. (Arthur H. Christy, U. S. Attorney, S. D. N. Y., New York, N. Y., on the brief), *for appellee.*

HINCKS, *Circuit Judge:*

On August 29, 1957, the Commissioner of Internal Revenue, under 26 U. S. C. A. § 7602, I. R. C. 1954, caused a summons to be served upon the New York Agency of the Bank of London & South America, Ltd., directing it to appear before a Special Agent of the Service and produce for examination "books, papers, records and memoranda of whatsoever nature or kind, relating to the accounts of Foster Construction C. A., and Grant Foster, including the signature cards, ledger sheets and cancelled checks, for the period 1949 to 1956 inclusive." When the Bank failed to obey the summons, the Commissioner under 26 U. S. C. A. § 7604, I. R. C. 1954, obtained an *ex parte* order from the District Court directing compliance. The Bank applied to have the order vacated, and Foster, the taxpayer whose tax liability was the subject matter of the investigation, and Foster Construction C. A., moved to intervene in support of the motion to vacate. On January 22, 1958, Judge Bicks entered an order allowing the intervention, the Government not opposing, and denying the motion to vacate. 159 F. Supp. 444. From this order the intervenors appeal.

We think Judge Bicks' decision was right. The motion to vacate was submitted below on affidavits. An agent of the Internal Revenue Service by affidavit asserted that he was investigating the tax liability of Grant Foster, a nonresident citizen of the United States, for the years 1949 to 1956, and that until 1949, Foster's income had been derived from the Foster Construction Company, his

individually owned business. The affidavit further showed that Foster claimed to have been employed ever since April 30, 1949 by the Foster Construction Compania Anonima, a Venezuelan corporation, and since 1955 or 1956 by a Costa Rican company of the same name. In the affidavit was incorporated a letter from the respondent Agency of the Bank which showed as its only reason for noncompliance that Foster, the appellant, who had maintained no account with the Bank since August 2, 1949, objected to the examination by the Commissioner of Foster's records for the portion of 1949 preceding August 2, 1949 as barred by the statute of limitations; and that Foster Construction C. A. had not authorized disclosure of its corporate records. The Agent's affidavit concluded with a statement that "the books and records demanded in the summons are required to authenticate the exclusion of income claimed by the taxpayer to have been received as salary from the Foster Construction C. A. since its inception, and afford the only opportunity for the government to determine whether the income received by the taxpayer from the Foster Construction C. A. actually represents salary or the distribution of profits in the form of salary."*

The simple uncontroverted allegations of fact in the agent's affidavit, as summarized in the foregoing text of this opinion, were enough, we hold, to support the order below. They showed that the inspection sought was in aid of an investigation properly authorized by Congress

* A supplemental affidavit by the agent, which we deem not essential to our disposition of the appeal, showed that the taxpayer's tax returns for 1949 and subsequent years had been filed not prior to October 9, 1953 and alleged that "on the basis of his investigation to date, this affiant has reasonable grounds to believe that much of the income excluded by this taxpayer from his personal income tax return has been fraudulently concealed through intercorporate manipulations of capital."

by § 7602 of the Internal Revenue Code of 1954. Not even the respondent itself suggested that compliance with the order would be unreasonably onerous. And surely the records sought were material and relevant to the investigation. That the foregoing considerations constitute the criteria for judicial enforcement of subpoenas issued by various administrative agencies is well established; an affirmative showing of probable cause for the administrative inquiry is not required. *Civil Aeronautics Board* v. *Hermann*, 353 U. S. 322; *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 208; *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501; *Hagen* v. *Porter*, 9 Cir., 156 F. 2d 362, cert. denied 329 U. S. 729; *Wilson* v. *United States*, 221 U. S. 361. The same principles and the same criteria are applicable to the enforcement of Internal Revenue subpoenas. *Application of Carroll*, 2 Cir., 246 F. 2d 762, cert. denied 355 U. S. 857; *Application of Levine*, D. C. S. D. N. Y., 149 F. Supp. 642, aff'd 243 F. 2d 175; *United States* v. *United Distillers Corp.*, 2 Cir., 156 F. 2d 872; *Zimmerman* v. *Wilson*, 3 Cir., 105 F. 2d 583; *In re Keegan*, D. C. S. D. N. Y., 18 F. Supp. 764; *Globe Construction Co.* v. *Humphrey*, 5 Cir., 229 F. 2d 148; *United States* v. *Peoples Deposit Bank & Trust Co.*, D. C. E. D. Ky., 112 F. Supp. 720, aff'd 212 F. 2d 86. And the test of materiality and relevance in this context is, of course, not whether the records sought, when disclosed, will or will not contradict the taxpayer's tax returns. The test, we think, is essentially the same as that for materiality with respect to grand jury investigations. *Wilson* v. *United States*, *supra*; *United States* v. *Morton Salt Co.*, *supra*, at page 642; *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, at page 216; *Falsone* v. *United States*, 5 Cir., 205 F. 2d 734, cert. denied 346 U. S. 864. It is whether the inspection sought "might have thrown light upon" the correctness of the taxpayer's returns. See *United States* v.

Siegel, et al., 2 Cir., February 17, 1959, —— F. 2d ——.* In this case, the Foster Construction C. A. records plainly "might have thrown light" on the question, crucial under I. R. C. 1954, § 911(a), whether or not the taxpayer, during the years under investigation received, directly or indirectly, from the foreign corporation salary constituting "earned income" or distributions of profits.

The appellants, in objecting to enforcement, assert that the examination sought was unnecessary and unreasonable because the three year Statute of Limitations, I. R. C. 1939, § 275(a), had run so that assessments on the years under investigation had already been barred. The summons and order under §§ 7602 and 7604, they insist, may issue only on a showing of probable cause to believe that the years of which investigation is sought are "open" years as to which the statute of limitations has not run. As we pointed out in *United States v. United Distillers Products Corp., supra*, the general three year statute of limitations was extended to five years by I. R. C. 1939, § 275 (I. R. C. 1954, § 6501(e)), in cases in which the understatement of gross income in the return exceeded 25%, and no time limitation whatever is applicable in cases of fraudulent returns, I. R. C. 1939, § 276 (I. R. C. 1954, § 6501(c)). We adhere to the position which we took in

* In *Application of Levine*, 149 F. Supp. 642, aff'd 2 Cir., 243 F. 2d 175, Judge Kaufman said: "The question of probable cause for such investigations comes into play when a third party is requested to produce records relating to the taxpayer under investigation. *See e.g. Falsone v. United States*, 5 Cir., 205 F. 2d 734, certiorari denied, 1953, 346 U. S. 864, 74 S. Ct. 103, 98 L. Ed. 375; *United States ex rel. Sathre v. Third Northwestern National Bank*, D. C. D. Minn., 102 F. Supp. 879, appeal dismissed, 8 Cir., 1952, 196 F. 2d 591." The context makes it plain that by this was meant only that a motion to enforce a subpoena against a third party should show some connection between the respondent and the taxpayer under investigation from which it may be reasonably believed that the respondent *may have* information relative to the investigation which justifies the burden of compliance.

the *United Distillers* case and hold that an examination, whether of a taxpayer or a third party, is not unnecessary or unreasonable (within the meaning of the Fourth Amendment) merely because three years, or five years, or any longer specified period of time has elapsed since the tax return under investigation was filed. The examination provided by § 7602 is for the expressly stated purpose not only "of ascertaining the correctness of any return" but also for "determining the liability of any person for any internal revenue tax." The Commissioner is therefore entitled to the examination if it may shed light on whether a liability still exists or whether it has been time-barred. As we stated in the *United Distillers* case, the Commissioner, as a condition to the issuance of a summons and order under §§ 7602 and 7604, should not be required to prove grounds for belief that the liability was not time-barred "prior to examination of the only records which provide the ultimate proof." *Zimmerman* v. *Wilson, supra; In re Upham's Income Tax*, D. C. S. D. N. Y., 18 F. Supp. 737; *In re Keegan, supra.* Cf. *Application of Carroll, supra.*

The appellants, citing *Hubner* v. *Tucker*, 9 Cir., 245 F. 2d 35, and *Local 174* v. *United States*, 9 Cir., 240 F. 2d 387, insist that the enforcement order instituted a search or seizure forbidden by the Fourth Amendment. But the appellants lack standing to raise that objection: the records sought were owned and possessed by the Agency of the Bank. *Zimmerman* v. *Wilson, supra; United States* v. *Peoples Deposit Bank & Trust Co., supra; In re Upham's Income Tax, supra; In re Andrews' Tax Liability*, D. C. D. Md., 18 F. Supp. 804. See also *Wilson* v. *United States, supra*, and *McMann* v. *Securities and Exchange Commission*, 2 Cir., 87 F. 2d 377, cert. denied 301 U. S. 684.

Quite apart from the appellants' lack of standing, we think it inadmissible to equate the enforcement order here under consideration with an unreasonable search and

seizure. See *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, at page 195. And in *Civil Aeronautics Board* v. *Hermann*, *supra*, it was held that a district court order enforcing a subpoena of the Board under 49 U. S. C. A. § 644(d), was valid although, as appears from the opinion below, 237 F. 2d 359, 362, there had been no express statement or finding by the district court even of the relevancy or materiality of the documents sought. This opinion was announced subsequent to the *Hubner* and *Local 174* cases and in effect overruled the holdings of those cases. It is in line with that of this Court in *McMann* v. *Securities and Exchange Commission*, *supra*, where it was held that a search instituted by a judicial enforcement order is unreasonable within the meaning of the Fourth Amendment only when "it is out of proportion to the end sought • • •" That certainly is not the situation here. For, as already noted, the Agency of the Bank makes no claim that compliance will cause it undue hardship.

We conclude, therefore, that a § 7602 examination made without an advance showing that the underlying tax liability is not time-barred is not necessarily "unreasonable." Constitutional immunity from unreasonable searches does not relieve a citizen of the testimonial duty to disclose information needed for the just and proper discharge of governmental functions. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Wilson* v. *United States*, *supra*; *Brownson* v. *United States*, 8 Cir., 32 F. 2d 844; and *United States* v. *First Nat. Bank of Mobile*, D. C. S. D. Ala., 295 F. 142, aff'd *per curiam* 267 U. S. 576; *McMann* v. *Securities and Exchange Commission*, *supra*. Cf. *Garland* v. *Torre*, 2 Cir., 259 F. 2d 545, cert. denied 358 U. S. 910.*

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* The appellants lean heavily on *O'Connor* v. *O'Connell*, 1 Cir., 253 F. 2d 365; *In re Brooklyn Pawnbrokers*, D. C. E. D. N. Y., 39 F. Supp. 304; and *Andrews' Tax Liability*, D. C. D. Md., 18 F. Supp. 804. These cases are distinguishable in that in each the summons had been directed to the taxpayer whose returns were under investigation. I. R. C. § 7605(b), on which the court in

The appellants also complain of an order by Judge Dawson, whereby Judge Bicks' order was superseded pending appeal only on condition that Foster, the taxpayer, waive the statute of limitations as a bar to possible tax assessments—a condition with which Foster complied. It was clear at that time that if the Commissioner was unable to examine the records until the appeal was decided here, the statute of limitations might have run on some at least of the years in question. And examination before appeal would have rendered the appeal moot.

We think Judge Dawson's solution for this impasse was proper as well as eminently practical. Judge Bicks had ordered the Bank to appear and produce. This was the equivalent of a mandatory injunction. The appeal is from his order denying a motion to vacate the injunctive order. We hold that the order fell within the scope of Federal Rules of Civil Procedure, Rule 62(c): it was an order continuing in effect the injunctive order theretofore made, *ex parte*. Plainly his order was neither a "judgment for the recovery of money" nor was it a "judgment [which] determines the disposition of real estate" under Rule 73(d). Consequently, under Rule 62(c) it lay within the discretion of the Court to suspend the injunctive order pending appeal "upon such terms as to bond *or otherwise* as it considers proper, for the security of the adverse party." Judge Dawson made wise use of that power.

In one respect only is the appellant, Foster, entitled to relief. The order below required waivers of the statute of limitations "covering all open tax years" as the condition of the stay pending appeal. This, we think, lacked necessary specificity: as an earlier section of our opinion shows, a § 7602 examination covering a specific year, and

its opinion in the *O'Connor* case largely relied, provides only for "Restrictions on *examination of taxpayer*"; it does not purport to circumscribe examinations of third parties. However, we prefer to base our opinion on the broader ground stated in the text.

perhaps subsequent litigation, may be necessary before it can be determined whether that year is "open" or time-barred. We think, therefore, the order below should have gone no further than to require waivers of years as to which the Commissioner sought examination, viz., 1949-1956, inclusive. It follows that the order below should be revised to provide for a return to Foster of the waivers for the years 1947 and 1948. The stipulation of March 4, 1958 so provided in the event that the order as to the waivers were to be so modified. Subject to this modification of the stay order, the order refusing to vacate the enforcement order is

Affirmed.

LUMBARD, *Circuit Judge*, concurring:

I dissent from the implied holding of the court that these appellants had standing to prosecute this appeal in the absence of an appeal by the Bank. As Judge Hincks' opinion holds with regard to their claims of an illegal search and seizure, the appellants had no standing to complain about the order to the bank to produce the records since it was admitted that the records were not in their custody and were not owned by them. I think that the same rule applies to their claims that the records demanded of the bank lacked materiality and relevance to the investigation.

A year and a half has now gone by since the Commissioner first sought to examine the records in question. This long delay is most undesirable. Our courts should not permit interventions which delay government action at the investigation stage unless the interest asserted is direct and immediate.

However, whether or not in the absence of any objection by the government this intervention should have been denied, the fact that it was granted does not add anything

to the standing of the intervenors on this appeal, cf. *Alexander Sprunt & Son, Inc.* v. *United States*, 281 U. S. 249, 255 (1930), and I would consequently dismiss their appeal for want of standing.

Since the court has decided the merits of the appeal, I think that it is nevertheless not inappropriate for me to express my agreement with what Judge Hincks has written.

APPENDIX C

Revision of Decision of Court of Appeals of March 16, 1959

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Chambers of
Carroll C. Hincks
U.S. Circuit Judge
New Haven 4, Conn.

March 18, 1959

Mr. A. Daniel Fusaro, Clerk
United States Court of Appeals
U. S. Courthouse
Foley Square
New York 7, N.Y.

Re: Grant Foster et al. v. United States
Docket No. 25073

Dear Mr. Fusaro:

I regret to inform you that through inadvertence the text of my opinion which was filed march 16, 1959 failed to show a revision of the last paragraph therein upon which the judges had unanimously agreed. I therefore direct, with the concurrences of Chief Judge Clark and Judge Lumbard, that the final paragraph of said opinion as filed (slip pages 712-713) be withdrawn, and that the following text be substituted therefor, viz.,

"Nor do we think it passed the bounds of discretion for Judge Dawson to deny the motion to amend the order which had conditioned a stay pending appeal upon delivery to the Commissioner of waivers covering 'all open years.' At that time, as appeared from the record below, five years had not elapsed since the tax returns of 1947 and 1948 had been filed. It was, therefore, proper and not unreasonable to require waivers for these, as well as subsequent, years as a condition precedent to a stay.

"Affirmed."

Sincerely yours,

/s/ C. C. Hincks

cc: Hon. Charles E. Clark
U.S. Courthouse & P.O. Bldg.
New Haven 6, Conn.

Hon. J. Edward Lumbard
U.S. Courthouse
New York 7, N.Y.

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No. 892

In the Supreme Court of the United States

OCTOBER TERM, 1958

GRANT FOSTER and FOSTER CONSTRUCTION C. A.,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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CHARLES K. RICE,
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In the Supreme Court of the United States

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---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 159 F. Supp. 444. The opinion of the Court of Appeals (Pet. 5a-14a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1959. (R. 57.)[1] A petition for

[1] References designated "R." are to the appendix to appellants' brief in the Court of Appeals.

rehearing *en banc*, filed on March 31, 1959, was denied on April 8, 1959. (R. 59-75.) Motion to recall the mandate and to stay its issuance, filed on April 17, 1959, was denied on April 17, 1959. (R. 80-83.) On April 24, 1959, Mr. Justice Harlan granted petitioners a stay of the order of the United States District Court for the Southern District of New York on condition that a petition for a writ of certiorari be filed on or before May 5, 1959. A petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether on the facts presented the courts below properly refused to vacate an order, entered pursuant to Sections 7602 and 7604 of the Internal Revenue Code of 1954, directing the production by a bank of records relating to the tax liability of the taxpayer.[2]

---

[2] An additional issue—whether an order allowing supersedeas pending appeal was properly conditioned on the taxpayer's waiver of the statute of limitations as a bar to possible tax assessments—was considered below, but no reason for further review of this issue is asserted in the petition. In any event, the Court of Appeals correctly concluded that the order fell within the scope of Rule 62(c) of the Federal Rules of Civil Procedure, which, in the discretion of the District Court, permitted suspension of the original order "upon such terms as to bond *or otherwise* as it considers proper for the security of the rights of the adverse party". (Emphasis supplied.) *Hovey* v. *McDonald*, 109 U.S. 150, 158-161; *Virginian Ry.* v. *United States*, 272 U.S. 658, 672-673.

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) *To Issue Orders, Processes, and Judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 7402.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or

fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 1952 ed., Supp. V, Sec. 7602.)

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance,

testimony, or production of books, papers, records, or other data.

(b) [as amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 87, and Sec. 208(d)(4), Highway Revenue Act of 1956, c. 462, 70 Stat. 374, 387] *Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 7604.)

STATEMENT

Grant Foster, hereafter referred to as taxpayer, allegedly was a non-resident citizen of the United States during the period 1949 to 1956 inclusive, having lived in Venezuela since April 1939. Prior to

April 30, 1949, his income allegedly was derived from the Foster Construction Company, his individually owned business. On that date, he allegedly became employed by the Foster Construction Compania Anonima, a Venezuelan corporation, hereafter referred to as the foreign corporation. In 1955 or 1956 he allegedly became employed by the Foster Construction Compania Anonima of Costa Rica. From the middle of 1949 to the date of the proceedings here involved, taxpayer claimed complete exclusion, for income tax purposes, of monies earned and purportedly paid to him as salary by the foreign corporation. (R. 3-4, 20.)

The foreign corporation maintained an active commercial banking account, from 1949 to 1956 inclusive, at the New York Agency of the Bank of London and South America, Limited, 34 Wall Street, New York City. The bank retained signature cards, ledger sheets and cancelled checks of the foreign corporation. (R. 4.)

On August 29, 1957, a special agent of the Internal Revenue Service, acting pursuant to Section 7602 of the Internal Revenue Code of 1954, served a summons upon the New York Agency of the bank to produce, for the period 1949 to 1956 inclusive, "Books, papers, records, and memoranda of whatsoever nature or kind, relating to the accounts of Foster Construction C.A. and Grant Foster, including the signature cards, ledger sheets and cancelled checks." (R. 4, 7.)

By letter dated September 9, 1957, the New York Agency of the bank advised the Internal Revenue Service that, in the absence of a court order, it did not propose to comply with the summons. Among other things, the letter stated that taxpayer had "not maintained any account in his own name with the Agency since August 2, 1949" and that it had "no books, papers, records or memoranda relating to any such account of Mr. Foster subsequent to that date"; that taxpayer's "counsel have objected to the examination of any of his records for 1949 on the ground that it is barred by the statute of limitations"; and that "there is no indication in the summons * * * why [the foreign] corporation's records in the Agency's possession should be subject to disclosure in connection with an investigation into an individual's tax liability." (R. 8-9.)

On September 18, 1957, Judge Archie O. Dawson of the United States District Court for the Southern District of New York, upon an *ex parte* showing that there had been no compliance with the summons, ordered the New York Agency of the bank to produce the requested records. The affidavit of Special Agent Nathan Zeldin, submitted to Judge Dawson, alleged, among other things, that "The books and records demanded in the summons are required to authenticate the exclusion of income claimed by the taxpayer to have been received as salary from the Foster Construction C.A. since its inception, and afford the only opportunity for the government to determine whether the income received by the taxpayer from the Foster Construction C.A. actually represents sal-

ary or the distribution of profits in the form of salary." (R. 1-2, 6.)

On September 19, 1957, Judge Dawson, upon the aforementioned order of examination dated September 18, 1957, and upon an affidavit of counsel for taxpayer, granted a motion for an order to show cause why the *ex parte* order previously entered should not be vacated. The motion to vacate was made by the bank; taxpayer and the foreign corporation applied for leave to intervene in support thereof. The affidavit submitted by taxpayer's counsel alleged, among other things, that "the tax liability of Grant Foster for the year 1949 is barred by the statute of limitations", and that there was "no showing that the books and records of Foster Construction, C.A. * * * pertain to the tax liability of Grant Foster or are material and relevant to his tax liability." (R. 9-11, 12, 24, 32.)

On January 23, 1958, District Judge Bicks ordered that the petitions for intervention be granted, and that the motion to vacate the order of September 18, 1957, be denied. (R. 23, 28.) In his memorandum opinion, Judge Bicks, adverting to the statement by taxpayer's counsel that, "upon information and belief, * * * Grant Foster's 1949 return was filed November 15, 1951", concluded that the "sources of his information and the grounds for his belief are not stated", and that "Against this assertion we have an unqualified allegation by a representative of the United States Treasury that said return was filed on October 9, 1953." (R. 26.)

Upon appeal by the taxpayer from the order denying the motion to vacate, the United States Court of Appeals for the Second Circuit affirmed. (Pet. 6a-15a.)[3]

ARGUMENT

1. Both courts below correctly concluded that there was no warrant for vacating the order enforcing the summons for the production of the bank's records. As the Court of Appeals stated (Pet. 7a-8a), "The simple uncontroverted allegations of fact in the agent's affidavit * * * were enough * * * to support the order below. They showed that the inspection sought was in aid of an investigation properly authorized by Congress by § 7602 of the Internal Revenue Code of 1954", *supra*, pp. 2-3. The records sought were (Pet. 8a) "material and relevant to the investigation." In this connection, Special Agent Zeldin's affidavit alleged that (R. 6) "The books and records * * * are required to authenticate the exclusion of income claimed by the taxpayer * * * and afford the only opportunity for the government to determine whether the income received by the taxpayer" was reportable or not. Moreover, there was no suggestion by the bank that (Pet. 8a) "compliance with the order would be unreasonably onerous", or that the investigation was "out of proportion to the end sought". *Zimmermann* v. *Wilson*, 105 F. 2d

[3] In a concurring opinion (Pet. 13a-14a), Judge Lumbard held that the District Court's decision was entitled to affirmance on the additional ground that the taxpayer-intervenor had no standing to appeal.

583, 585 (C.A. 3d). These considerations, as the Court of Appeals concluded, constituted proper criteria for the judicial enforcement of the summons in question, and (Pet. 8a) "an affirmative showing of probable cause for the administrative inquiry is not required." Cf. *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322; *Application of United States (Carroll)*, 246 F. 2d 762, 764 (C.A. 2d), certiorari denied, 355 U.S. 867. It was enough that the records sought here (Pet. 9a) " 'might have thrown light' on the question, crucial under I.R.C. 1954, § 911(a), whether or not the taxpayer, during the years under investigation received, directly or indirectly, from the foreign corporation salary constituting [non-taxable] 'earned income' or [taxable] distributions of profits." Cf. *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5th); *Bolich* v. *Rubel*, 67 F. 2d 894, 895 (C.A. 2d).

2. There is no conflict of decisions. The contrary contention (Pet. 10-23) is based upon the erroneous premise that in order to open the year 1949 for investigation the Commissioner was required to make some preliminary showing with respect to the possible existence of fraud. But the District Court in effect found, on the conflicting affidavits before it, that taxpayer's return for 1949 was not filed on November 15, 1951, as taxpayer's counsel averred in his affidavit, but on October 9, 1953, in accordance with the (R. 26) "unqualified allegation by a representative of the United States Treasury". Accordingly, since there was considerably less than a five year lapse between the date of the filing of the

return and the date of the beginning of the investigation, the Commissioner was free to make an assessment, without any showing as to possible fraud, if, in fact, taxpayer had understated the gross income reported in his 1949 return by more than twenty-five per cent.[4] It has been held that the broad investigative powers authorized by provisions similar to Section 7602 of the 1954 Code "would be of no practical effect if the [Internal Revenue Service] were barred from making the investigation necessary to ascertain *such a misstatement.*" (Emphasis supplied.) *United States* v. *United Distillers Products Corp.*, 156 F. 2d 872, 874 (C.A. 2d).

Even if it is assumed, *arguendo*, that the Commissioner, in order to justify opening the year 1949 for investigation, was required to make some preliminary showing of a twenty-five per cent understatement of gross income—a contention neither explicitly made in the petition nor supported by judicial authority—such a showing, we submit, was made below in Special Agent Zeldin's supplemental affidavit, in which it was stated that on the basis of the investigation conducted to date, there were (R. 17) "reasonable grounds to believe that *much of the income excluded* by this taxpayer from his personal income tax return has been fraudulently concealed through intercorporate manipulations of capital." (Emphasis supplied.)

---

[4] Section 275(c) of the Internal Revenue Code of 1939; Section 6501(e) of the Internal Revenue Code of 1954.

Even if it is further assumed for purposes of argument that the filing date claimed by taxpayer is correct, and that the Commissioner ultimately would be required to prove fraud in order to make an assessment for 1949, the District Court was justified in concluding that (R. 27) "the Government has set forth sufficient to permit it to pursue its inquiry into the records described in the summons." The supplemental affidavit adverted to above—which the Court of Appeals properly considered as "not essential" to the disposition of the appeal (Pet. 7a)—demonstrated a reasonable basis for at least suspecting that taxpayer, by "intercorporate manipulations of capital", had "fraudulently concealed" reportable income (Pet. 7a.) Cases cited by petitioners (*O'Connor* v. *O'Connell*, 253 F. 2d 365, 369-370 (C.A. 1st); *Zimmermann* v. *Wilson*, 105 F. 2d 583, 586 (C.A. 3d); *Globe Construction Co.* v. *Humphrey*, 229 F. 2d 148 (C.A. 5th); *Peoples Deposit Bank & Trust Co.* v. *United States*, 212 F. 2d 86, 87 (C.A. 6th); *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731, 735 (C.A. 9th)) as establishing a conflict with the decision below (Pet. 10-11) require no greater showing in order to permit inquiry under the summons provisions of the Internal Revenue Code.

CONCLUSION

The decision of the court below is correct, there are no conflicting decisions, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1959

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